7

No. 06-1005

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

EFRAIN SANTOS AND BENEDICTO DIAZ

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, N.W.
Washington, DC 20006

JEFFREY T. GREEN*
KEVIN M. HENRY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amicus Curiae

*Counsel of Record

August 22, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in financial transactions using the "proceeds" of specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether "proceeds" means the gross receipts from the unlawful activities or only the profits, *i.e.*, the gross receipts less expenses.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. THE MONEY LAUNDERING STATUTE IS SUBJECT TO EXPANSIVE INTERPRETATIONS THAT INVITE PROSECUTORIAL MISUSE	4
II. EXPANSIVE INTERPRETATIONS OF § 1956 HAVE SIGNIFICANT NEGATIVE RAMIFICATIONS FOR THE CRIMINAL JUSTICE SYSTEM	7
III. THE SEVENTH CIRCUIT'S INTERPRETATION PROPERLY LIMITS THE SCOPE OF THE ACT	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Cuellar v. *United States*, 478 F.3d 282 (5th Cir. 2007), *petition for cert. filed*, No. 06-1456 (U.S. May 3, 2007) 1
United States v. *Akintobi*, 159 F.3d 401 (9th Cir. 1998) 5
United States v. *Cabrales*, 524 U.S. 1 (1998) 1
United States v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994) 6
United States v. *Edgmon*, 952 F.2d 1206 (10th Cir. 1991) 4
United States v. *Estacio*, 64 F.3d 477 (9th Cir. 1995) 5
United States v. *Johnson*, 971 F.2d 562 (10th Cir. 1992) 4
United States v. *Ness*, 466 F.3d 79 (2d Cir. 2006), *petition for cert. filed*, No. 06-1604 (U.S. June 1, 2007) 5
United States v. *Posters N' Things, Ltd.*, 969 F.2d 652 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994) 5
United States v. *Reed*, 77 F.3d 139 (6th Cir. 1996) 6
United States v. *Skinner*, 946 F.2d 176 (2d Cir. 1991) 7
United States v. *Stavroulakis*, 952 F.2d 686 (2d Cir. 1992) 4
United States v. *Sutera*, 933 F.2d 641 (8th Cir. 1991) 5
United States v. *Wydermyer*, 51 F.3d 319 (2d Cir. 1995) 6
Whitfield v. *United States*, 543 U.S. 209 (2005) 1

TABLE OF AUTHORITIES – continued

Page

STATUTES

18 U.S.C. § 1955 9
§ 1956 ..... 2, 3
§ 1957 3

LEGISLATIVE HISTORY

132 Cong. Rec. S9626 (daily ed. July 24, 1986)..... 3
132 Cong. Rec. S9938 (daily ed. July 31, 1986)..... 3

SCHOLARLY AUTHORITIES

Mariano-Florentino Cuellar, *Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311 (2003) 6, 8
Eric J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 Temp. Pol. & Civ. Rts. L. Rev. 517 (2005)..... 8
Mary McNamara & Edward W. Swanson, *Money Laundering: How Prosecutors Clean Up under 18 U.S.C. Sections 1956 and 1957*, 26 Forum 61 (1999), *available at* http://www.smhlegal.com/articles/ money520laund.pdf..... 7
John K. Villa, *Banking Crimes* (2006) 6, 8

OTHER AUTHORITIES

USSG § 2S1.1(b)(2)(B)..... 8
App. C 7

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs on various issues in this Court and other courts and has filed *amicus curiae* briefs in previous suits related to 18 U.S.C. §1956. See *Whitfield* v. *United States*, 543 U.S. 209, 211 (2005) ("whether conviction for conspiracy to commit money laundering . . . requires proof of an overt act in furtherance of the conspiracy"); *United States* v. *Cabrales*, 524 U.S. 1, 3 (1998) (discussing the appropriate venue for trial of money-laundering offenses); see also *Cuellar* v. *United States*, 478 F.3d 282 (5th Cir. 2007), *petition for cert. filed*, No. 06-1456 (U.S. May 3, 2007).

---

[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

Respondents Santos and Diaz were convicted for their roles in the operation of an illegal lottery in Indiana. The participants or gamblers in the lottery placed their bets with "runners" who took a percentage of the money as a commission and delivered the balance of the money and betting slips to "collectors." The collectors in turn provided the remainder of the money and the betting slips to Santos, and received a salary or commission for doing so from the money collected. Respondent Diaz was a collector in the operation. Pet. App. 2a, 19a.

In addition to being convicted under 18 U.S.C. § 1955 for his involvement in the illegal gambling operation, and under 18 U.S.C. § 371 for conspiracy to violate Section 1955, Santos also was convicted of money laundering under 18 U.S.C. § 1956(a)(1)(A)(i), and conspiracy to commit money laundering under 18 U.S.C. § 1956(h). Pet. App. 2a-3a. For his part, Diaz was convicted, after a guilty plea, of conspiracy to commit money laundering under 18 U.S.C. § 1956(h). *Id.* at 3a.

Section 1956 of the Act prohibits financial transactions using the "proceeds" of "specified unlawful activity . . . with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(a)(A)(i). With respect to Santos, the money laundering convictions were based upon Santos' payments to the lottery's collectors and winners. Diaz's conviction was based on his receipt of payment for his collection services. Pet. App. 6a. Thus, the money laundering convictions were premised on the theory that these payments were made and received with the intent and design to "promote the carrying on" of the illegal lottery.

As a result of his money laundering conviction, Santos was sentenced to 210 months in prison – nearly four times longer than the maximum five year sentence for committing the

underlying gambling offense. Pet App. 18a, 20a. Diaz received a shorter sentence on the basis of his guilty plea.

SUMMARY OF ARGUMENT

In the decision below, the United States Court of Appeals for the Seventh Circuit correctly interpreted the term "proceeds" in 18 U.S.C. § 1956(a)(1)(A)(i) to mean profits. This interpretation properly limits the scope of § 1956 consistent with Congress' intent in enacting the Money Laundering Control Act of 1986 (the "Act"), 18 U.S.C. §§ 1956-1957. The clear goal of the Act was to criminalize the process of giving ill-gotten gains the appearance of legitimacy through financial transactions – classic "money-laundering" operations – and thus to prevent the concealment and spread of criminal activity. See 132 Cong. Rec. S9626 (daily ed. July 24, 1986) (statement of Sen. Thurmond) ("Creation of a money laundering offense is imperative if our law enforcement agencies are to be effective against the organized criminal groups which reap profits from unlawful activity by camouflaging the proceeds through elaborate laundering schemes."). Congress did not intend to punish defendants twice for the same conduct by imposing additional penalties for the underlying activity that generates the illegal proceeds. See 132 Cong. Rec. S9938 (daily ed. July 31, 1986) (statement of Sen. D'Amato) ("we are creating a new crime of money laundering"). But, that is precisely what Petitioner's broad interpretation of the Act would do.

Notwithstanding the limited purpose of the Act, amici's experience is that the instant case reflects a typical and growing use of § 1956 as a vehicle for increasing potential sentences substantially in excess of what otherwise would be permissible for the underlying conduct – without any showing of the aggravated societal harm that the money laundering statute was designed to redress; that is, the disposition of ill-gotten gains to expand criminal enterprises or to disguise those gains by creating the appearance of legitimate wealth.

Because the Seventh Circuit's holding would prevent this misuse of § 1956, *amici* urge the Court to affirm.

ARGUMENT

I. THE MONEY LAUNDERING STATUTE IS SUBJECT TO EXPANSIVE INTERPRETATIONS THAT INVITE PROSECUTORIAL MISUSE.

This case highlights the inappropriate and unfair misuse of the money laundering statute to "tack on" additional charges and significantly enhanced penalties to punish conduct that is virtually indistinguishable from the underlying offense. The basis for the money laundering charges at issue here is the payment of winnings to the participants in the illegal lottery and the payment (and receipt) of salaries to the lottery's employees. That very same conduct was integral, not supplemental, to the continuing operation of the illegal lottery. But as a result of the additional money laundering charges, Respondents faced potential sentences of twenty years – four times longer than the five year maximum for the underlying offense. Indeed, Santos' actual sentence was close to that increased maximum. Pet App. 18a, 20a. Such an application of the Act was not intended by Congress. See *United States* v. *Stavroulakis*, 952 F.2d 686, 691 (2d Cir. 1992) (citing S. Rep. No. 99-433 (1986) and H.R. Rep. No. 99-855 (1986)); *United States* v. *Johnson*, 971 F.2d 562, 569 (10th Cir. 1992).

Congress's intent in enacting the money laundering statutes in 1986 was to fill a discrete gap in the criminal law by preventing the hiding and reinvestment of proceeds derived from criminal activity. See *United States* v. *Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991) (discussing legislative history). Notwithstanding this clear intent, many courts have adopted extraordinarily expansive interpretations of the statute, applying it in circumstances that unfairly penalize defendants without doing anything to advance the statutory purpose.

For instance, the term at issue in this case – "proceeds" – has been construed in a variety of ways designed to broaden the statute's scope. The Government's theory in this case illustrates one such expansive reading. In other cases, contrary to the plain language of the statute, "proceeds" has been held to include worthless items. See *United States* v. *Akintobi*, 159 F.3d 401, 403-04 (9th Cir. 1998) (holding that, although the term "may refer to something of value," it "has the broader meaning of 'that which is obtained . . . by any transaction,'" and therefore included checks that "ultimately proved worthless because the accounts backing them up were either empty or closed") (citation omitted); see also *United States* v. *Estacio*, 64 F.3d 477, 480 (9th Cir. 1995), *as amended on denial of reh'g* (noting that courts "define the term broadly," and holding that "proceeds" included "[a] fraudulently obtained line of credit, which results in an artificially inflated bank balance").

The expansive interpretations of the term "proceeds" are all the more troubling because prosecutors and courts have also undermined the limiting effect of other essential terms in the statute, such as the "conceal or disguise" element and the "transaction" element. For example, the Second Circuit recently upheld the money laundering conviction of the owner of an armored-car business for transportation of cash, without requiring any evidence that the cash transportation was designed to create the appearance of legitimate wealth. *United States* v. *Ness*, 466 F. 3d 79, 81 (2d Cir. 2006), *petition for cert. filed*, No. 06-1604 (U.S. June 1, 2007).

Some courts also have found the "conceal" element satisfied when the defendant has done no more than commingle the proceeds of lawful and unlawful activity in a single bank account. See *United States* v. *Posters 'N' Things, Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992) (deposit by "head shop" owner of shop proceeds into business account), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States* v. *Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (deposit of gambling

proceeds into family business account bearing defendant's name).

Courts have broadly interpreted other provisions of § 1956 as well. To be convicted under § 1956(a)(1), a defendant must have conducted a "financial transaction," which § 1956(c)(4) defines as "a transaction which in any way or degree affects interstate or foreign commerce" involving, inter alia, "the movement of funds by wire or other means." Some courts have construed the phrase "or other means" to be virtually unlimited. See, *e.g.*, *United States* v. *Reed*, 77 F.3d 139, 143 (6th Cir. 1996) (delivery of money by courier "involved the movement of funds by wire or other means") (internal quotations omitted); *United States* v. *Wydermyer*, 51 F.3d 319, 326-27 (2d Cir. 1995) ("physical transportation of money out of the United States by hand" is a financial transaction by "other means"); *United States* v. *Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994) (noting that physical delivery of cash is "movement of funds by wire or by other means"). According to one commentator, such interpretations have "the potential to extend the reach of the money laundering statute to any movement of property and greatly expand its scope." John K. Villa, *Banking Crimes* § 8:10 (2006). Another commentator expressed a similar concern:

> The continuing trend toward widening what is meant by financial transaction gives prosecutors ever more leeway in deciding when to use [section] 1956, because the occurrence of some kind of financial transaction is what triggers liability under the statute. In short, the pattern is that interpretations have become more draconian over time.

Mariano-Florentino Cuellar, *Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311, 348 (2003).

As a result of such expansive interpretations of these terms, many courts now punish as "money laundering" conduct that bears virtually no relation to the concept as it is commonly understood. See *United States* v. *Skinner*, 946 F.2d 176 (2d Cir. 1991) (sale of cocaine sufficient for conviction under the money laundering statute). "[T]he fluidity of the judicial understanding of these concepts means that defenses based on grammar and logic seem doomed to failure." Mary McNamara & Edward W. Swanson, *Money Laundering: How Prosecutors Clean Up under 18 U.S.C. Sections 1956 and 1957*, 26 Forum 61 (1999), available at http://www.smhlegal.com/articles/money520laund.pdf (last visited Aug. 21, 2007). These interpretations raise serious concerns that the power of prosecutors to bring a defendant's conduct within the statute has been unfairly and improperly expanded. "Distinctions in the details of [sections] 1956 and 1957 [a companion money laundering statute] should not obscure the prevailing pattern in the way courts parse the statutes' abstruse terms: with just occasional exceptions, over time the statutes' interpretation has tended to favor prosecutors." Cuellar, 93 J. Crim. l. & Criminology at 343.

II. EXPANSIVE INTERPRETATIONS OF § 1956 HAVE SIGNIFICANT NEGATIVE RAMIFICATIONS FOR THE CRIMINAL JUSTICE SYSTEM.

As this case demonstrates, an overbroad reading of the principal money laundering statute will have severe consequences for the many criminal defendants accused of violating it, and for the criminal justice system as a whole. Section 1956 imposes harsh penalties: a statutory maximum of up to twenty years' imprisonment and a fine of either $500,000 or twice the value of the property involved in the transaction, whichever is greater. Additionally, although the Sentencing Guidelines were amended in 2001 in an effort to "tie[] offense levels for money laundering more closely to the underlying conduct," U.S. Sentencing Guidelines Manual app. C, amend. 634 (2001), reason for amend. (2006), money

laundering charges can, as in this case, result in a sentence far greater than that for the predicate offense alone when the offense is not a drug trafficking crime. Villa, § 11:30 (Supp. 2006); see also Cuellar, *supra*, at 348-49 (2001 Sentencing Guidelines amendments left sentences for money laundering "severe enough that prosecutors and investigators could use money laundering charges as substitutes for underlying predicate offense charges that might be more difficult to prove against particular defendants"). Conviction under § 1956 automatically adds two offense levels to the base level offense applicable to the underlying offense, even if no other sentencing enhancements apply. USSG § 2S1.1(b)(2)(B).

The prospect of a higher sentence allows prosecutors to extract plea bargains and forfeitures that might not otherwise be obtained and that may not be in the interest of justice. See Eric J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 Temp. Pol. & Civ. Rts. L. Rev. 517, 534-35 (2005) (noting, in the context of anti-money laundering provisions in the USA PATRIOT Act, that "prosecutors have used money laundering violations as a device to leverage up the criminal consequences for regulated behavior, creating incentives for the accused to plea bargain"). Because an indictment with a § 1956 charge risks heavier sentence than does an indictment (for the same conduct) without such a charge, prosecutors have a great incentive to threaten such a charge to enhance their bargaining leverage. The mere threat of a money laundering charge thus can be a powerful weapon in the prosecutor's negotiating arsenal.

This vast increase in potential punishment is entirely unjustifiable if it is not accompanied by greater culpability on the part of the accused – and, specifically, by the culpability that Congress meant to punish when it enacted the statute in the first place. Instead, prosecutors and courts have interpreted § 1956 to apply to the myriad crimes where funds

are merely an aspect of the enterprise at issue and therefore to embrace conduct that comes nowhere close to presenting the dangers to society that the money laundering statute was designed to address. Defendants, including Respondents here, should not face enhanced potential sentences for conduct not meaningfully more blameworthy than the underlying predicate offenses.

III. THE SEVENTH CIRCUIT'S INTERPRETATION PROPERLY LIMITS THE SCOPE OF THE ACT.

The Seventh Circuit's interpretation of the term "proceeds" as limited to profits is consistent with congressional intent and necessary to prevent defendants from inappropriately being punished twice (and more severely) for the same conduct. Petitioner's argument to the contrary is unpersuasive, and actually demonstrates that Respondents' underlying conduct is indistinguishable from that which forms the basis of the money laundering charge.

Petitioner argues that the money laundering offense is separate and distinct from the gambling offense because "[p]roof that payments were made to employees or to winners is not required to establish a violation" of the underlying gambling statute, 18 U.S.C. § 1955(b)(1). Br. for U.S. at 41. But such an "identity of the elements" test does not answer the question presented here as to exactly what the elements of a money-laundering charge are. Petitioner's argument also fails in its additional effort to diminish concern about unfair multiplicity of charges. Even Petitioner admits that a charge under § 1955, which prohibits "illegal gambling *businesses*," requires a showing that the operation "must remain in continuous operation for more than 30 days or have gross revenue of at least $2,000 in any given day." *Id.* (emphasis added). Accordingly, the elements and purpose of § 1955 expressly contemplate the operation of a business, which itself implies the payment of expenses (and thus, "promotion" in Petitioner's view as well, see *infra*), along with the receipt of revenues – precisely the same requirements for application

of the money-laundering statute under Petitioner's expansive interpretation. There is thus every reason for concern that follow-on § 1956 charges may be purely "make weight" and open to arbitrary and capricious application.

Petitioner also contends that the payments made to employees or to winners make it possible for the operation to continue and thus amounts to "promotion" under the money laundering statute. See *id.* at 23. Thus, at least in those instances in which the basis for the § 1955 violation is the continuing operation of the scheme, Petitioner apparently would concede that the conduct which amounts to "promotion" is indistinguishable from the conduct supporting the § 1955 charge.

Interpreting "proceeds" to mean only profits avoids the problem of unfair multiplicity by ensuring that a money laundering charge is based on what Congress intended – the re-investment of illegal *profits* to *expand* unlawful activities.

CONCLUSION

For the foregoing reasons, as well as those stated in Respondents' Briefs, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

PAMELA HARRIS
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, N.W.
Washington, DC 20006

JEFFREY T. GREEN*
KEVIN M. HENRY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amicus Curiae

*Counsel of Record

August 22, 2007